IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor
Bureau of Employees Compensation

and

MARY JONES,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS

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OPINION BELOW

The Opinion of the Court of Appeals is reported at 500 F.2d 815. (App. 26-37)

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1974 (App. 2). The Petition for a Writ of Certiorari was filed on September 30, 1974, and was

granted on January 20, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Where more than one year has elapsed between the date of last compensation payment and assertion of a claim for additional workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, as made applicable to the District of Columbia, is the employee's claim for additional compensation barred by the one-year time limitation provisions of the Act?

STATUTES INVOLVED

The relevant statutes, as of the dates involved in this case, provided as follows:

United States Code, Title 33:

§ 913. Time for filing of claims

(a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(b) Notwithstanding the provisions of subdivision (a) of this section failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of subdivision (a) of this section shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such gaurdian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

March 4, 1972, c. 509, §13, 44 Stat. 1432.

§914. Payment of Compensation.

* * *

(m) The total money allowance payable to an e employee as compensation for an injury under this chapter shall in no event exceed in the aggregate the sum of $17,280.00: *Provided,* That this limitation shall not apply to cases of permanent total disability or death: *And provided further,* That in applying this limitation there shall not be taken into account any amount payable under Section 908(g) of this title for maintenance during rehabilitation or any amount of additional compensation required to be paid under this section for delay or default in the payment of compensation or any amount accruing as interest upon defaulted compensation collectible under Section 918 of this Title.

Mar. 4, 1927, c. 309, §14, 44 Stat. 1432; May 26, 1934, c. 354, §4, 48 Stat. 807; June 25, 1938, c. 685, §7, 52 Stat. 1167; June 24, 1948, c. 623, §5, 62 Stat. 603; July 26, 1956, c. 735, §5, 70 Stat. 655.

§ 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 919 of this title, and in accordance with such section issue a new compensation order

which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

March 4, 1972, c. 509, §22,44 Stat. 1437; May 26, 1934, c. 354, §5, 48 Stat. 807; June 25, 1938, c. 685, §10, 52 Stat. 1167.

District of Columbia Code:

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.

The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, § 1).

Effective Date

Section 3 of the Act May 17, 1928, provided that: "This Act [adding this section and section 36-502] shall take effect July 1, 1928."

STATEMENT OF THE CASE

On July 19, 1960, Charles E. Jones (hereinafter claimant or employee) was injured while working for Intercounty Construction Corporation (hereinafter employer) (App. 27). On August 12, 1960, he filed a claim under the District of Columbia Workmen's Compensation Act, 45 Stat. 600, 36 D.C. Code §36-501, for workmen's compensation benefits due to permanent disability with the Bureau of Employees' Compensation, U.S. Department of Labor. (App. 27)

On August 25, 1960, the employer's workmen's compensation carrier, Hartford Accident & Indemnity Company, (hereinafter carrier) filed an answer admitting that the claimant was injured in the course of his employment but denying that he was permanently disabled to the extent stated in the claim. (App. 28) At the same time, the carrier filed a written notice to the Deputy Commissioner that payment of compensation had been begun without awaiting an award. (App. 28) The carrier then commenced paying the claimant $54.00 per week, the then maximum weekly rate for temporary total disability. (App. 28)

On January 6, 1965, the carrier filed a written notice with the Deputy Commissioner indicating that Mr. Jones' claim would be controverted due to wages, extent of disability, and unauthorized medical care in St. Petersburg, Florida. (App. 28) The maximum weekly benefits of

$54.00 per week continued to be paid to the claimant by the carrier until April 27, 1965, when it informed the Deputy Commissioner that it was reducing the claimant's compensation to $27.00 per week, which payments were computed on a 50% temporary partial disability basis. (App. 28, 29)

On June 1, 1965, the claimant and his attorney were notified by the Claims Examiner of the U.S. Department of Labor, who was handling Mr. Jones' claim, of the carrier's position relative to the reduction in weekly payments, and he indicated that if the claimant intended to contest the carrier's position, he should do so through his attorney so that any claim he was making might be clearly presented. (App. 29) On August 26, 1966, an informal conference was held by the Claims Examiner with the claimant, his attorney, and the carrier's representative present. The conference was adjourned without any resolution of the claim, and no recommendations were made by the Claims Examiner. (App. 29)

On January 23, 1968, the carrier filed with the Bureau of Employees Compensation, B.E.C. Form 208, indicating that compensation payments had been stopped since the statutory maximum under the District of Columbia Workmen's Compensation Act (except for permanent and total disability) had been paid. 33 U.S.C. §914 (m) (App. 29) Both the claimant and his attorney received a copy of said notice. (App. 12, 14)

On February 11, 1970, attorney Jefferson de R. Capps requested a hearing on Mr. Jones' claim for permanent and total disability. (App. 15, 29 Hearings on that claim were held in Tampa, Florida, on December 21, 1970, and January 14, 1971, before Deputy Commissioner R. H. Bergeron, Deputy Commissioner for the Sixth Compensation

District. (App. 29) On May 24, 1971, Deputy Commissioner Noah C.A. Walter, of the District of Columbia Compensation District, entered a compensation order rejecting the claim of Charles E. Jones on the basis that more than one year had elapsed between the date of last compensation payment and the new claim for permanent total disability advanced by the claimant's attorney. (App. 16-20, 29)

The claimant then filed suit in the U.S. District Court for the District of Columbia to set aside this determination whereupon counsel for the claimant and counsel for the defendant Deputy Commissioner presented a consent order for remand (the employer and carrier not being a party to the action). (App. 29) The case was then sent back to Deputy Commissioner Walter for a determination on the merits, and on February 8, 1972, the Deputy Commissioner entered an order awarding the claimant compensation for permanent total disability. (App. 21-24, 29)

The employer and carrier in turn filed suit in the U.S. District Court for the District of Columbia to enjoin enforcement of the compensation order. Upon consideration of the parties' respective motions for summary judgment, the District Court held that the claim of Charles Jones for permanent and total disability was barred by §22 of the Act, relying on *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir. 1972), *cert. denied,* 409 U.S. 887 (1972), *rehearing denied,* 409 U.S. 1002 (1972). (App. 25, 30)

The Deputy Commissioner noted a timely appeal, and while the matter was pending before the Court of Appeals, Mary Jones, guardian of the incompetent claimant, was permitted to intervene. (App. 2)

On July 3, 1974, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court and held that the time limitation provisions of the Longshoremen's Act did not bar the claim of Charles Jones for permanent and total disability. In doing so, it expressly rejected the *Strachan Shipping Company v. Hollis* case, 460 F.2d 1108 (5th Cir. 1972), *cert. denied* 409 U.S. 887, (1972), *rehearing denied* 409 U.S. 1002 (1972), upon which the District Court had relied. (App. 26-37)

SUMMARY OF ARGUMENT

Section 22 of the Longshoremen's and Harbor Workers' Act, as made applicable to the District of Columbia, both by its plain language and court decisions interpreting same, provides that a Deputy Commissioner has the power, at any time prior to one year after the date of last payment of workmen's compensation benefits, whether or not a compensation order has been issued, to increase, decrease, terminate, continue, reinstate or to award compensation. If a claimant, therefore, fails to apply for further compensation within a year after he has received his last compensation benefits, then his claim is time-barred, and the Deputy Commissioner has no further power to act thereon.

The statutory scheme of the Longshoremen's Act, and the administrative handling thereof, both are designed to insure that injured workers promptly receive the workmen's compensation benefits to which they are entitled on a voluntary basis without the necessity of going through formal hearings. Employers and insurance carriers who voluntarily pay workmen's compensation benefits to an injured worker without an award or without a formal compensation order, will not enjoy the limitation provisions of §22 with respect to old or stale claims, while those carriers, who

controvert their liability to the extent of having a formal compensation order issued, will enjoy that protection if the Court of Appeals view in this case is sustained.

ARGUMENT

I. PLAIN LANGUAGE OF STATUTE INDICATES EMPLOYEE'S CLAIM IS TIME-BARRED.

The basic question raised on this appeal is whether or not the time limitations provisions of §22 of the Longshoremen's Act bar the claim of Charles Jones for additional compensation where more than one year has elapsed between the cessation of voluntary compensation payments and the assertion of a claim for additional benefits. Petitioners respectfully contend that the claim is time-barred.

Prior to the Court of Appeals decision in this case, the leading and most recent case construing the Act's one-year time limitations provisions was *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir. 1972), *cert. denied*, 409 U.S. 887, (1972) rehearing denied, 409 U.S. 1002 (1972). There the employee filed his original claim for workmen's compensation benefits within one year from when he was injured. During the ensuing years, numerous informal conferences were held, and intermittent voluntary compensation payments were made by the Workmen's Compensation carrier. No formal hearing was ever held nor any formal compensation order entered.

Approximately 12 years after the date of last compensation payment, the claimant submitted a second written claim, and the Deputy Commissioner awarded him compensation benefits, the carrier's time-limitation defense under §22 being rejected. In both the District Court

(323 F. Supp. 1123 [S.D. Tex. 1970]) and appellate consideration of the time limitations problem, it was held that since the claimant had not filed his second claim for workmen's compensation benefits within one year from the date of last payment of compensation, further compensation for that injury was barred by §22 of the Act.

The Fifth Circuit panel pointed out that the Act reflected a legislative intention to encourage voluntary payment of compensation benefits and to discourage formal hearings. In addition to policy considerations and general Congressional intent to secure voluntary compliance with the Act by employers, the Court also noted that the language of §22 triggering the one-year limitation period from the date of last compensation payment was plain.

There is other precedent similarly interpreting the Act's time limitations provisions. In the case *O'Keeffe v. U.S.F. & G. Co.*, 338 F.2d 21 (5th Cir. 1964), one Walter Williams sustained a back injury while working for the Gibbs Corporation on July 10, 1957. He received workmen's compensation benefits from July 11, 1957 to September 28, 1957. (Pet. for Cert., App. 19-24)

On September 26, 1958, he filed a formal claim with the Deputy Commissioner. On August 26, 1959, the carrier paid compensation from September 28, 1957, to November 28, 1958.

On July 4, 1961, the employee wrote a letter to the Deputy Commissioner, which was treated as a claim for compensation, and eventually on February 21, 1963, the Deputy Commissioner entered an award for additional compensation.

Upon the carrier's complaint to set aside the award, as being barred by the time limitations provisions of §22, the U.S. District Court Judge for the Middle District of Florida, Jacksonville Division, sustained the carrier's contention, and the award was vacated. The case was appealed, and the District Court's decision was affirmed in a cursory *per curiam* opinion.

In the unreported case of *Maryland Casualty Co. v. Britton*, U.S. District Court for the District of Columbia, Civil Action No. 14297 (1942), where an appeal was initially noted by the government, but abandoned, the employee sustained an injury to the finger on his left hand in a linotype machine on August 8, 1936. (Pet. for Cert., App. 25-33) On November 10, 1936, the employee filed a written claim for compensation, and at the same time also executed a written waiver of his right to a formal hearing plus a willingness to accept a 50% permanent partial disability rating on the finger. The insurance carrier agreed to the rating and paid the employee accordingly.

The carrier paid additional compensation on May 27, 1938, and the appropriate form was filed with the Bureau. On June 20, 1941, the employee filed another written claim against the employer, alleging additional disability as a result of the original occurrence in 1936. Justice Jennigns Bailey reversed the Deputy Commissioner and held that §22 of the Act barred the right of the employee from any entitlement to further compensation, since he had failed to file a further claim within one year from the date of last compensation payment by the carrier.

Also to be considered is the unreported case of *Jessie Harris v. CECO Corp.*, Case No. 73-DCWC-5, decided by Administrative Law Judge William Naimark on April 26,

1973 (Pet. for Cert., App. 34-42). No appeal was taken from that decision by either the claimant's attorney or the Director, Office of Workers' Compensation Programs.

The decision reveals that on June 8, 1966, the claimant was struck in the abdomen while working as a carpenter's helper. Within one year from the date of injury, he filed a written claim for workmen's compensation benefits with the Bureau of Employees Compensation, U.S. Department of Labor.

Subsequently, the Claims Examiner recommended payment of compensation on a permanent partial disability basis, which was made by the carrier on October 27, 1967. No further claim for additional compensation benefits was made until more than one year after that date. Judge Naimark held that any claim for additional compensation benefits was barred by the time limitations provisions of the Act.

Despite the foregoing decisions, all of which were cited to the Court of Appeals, it was held by that court that §22 of the Act applied only to cases in which a final compensation order had been entered or denied. (App. 26-37) Petitioners respectfully suggest that that holding was erroneous.

In discussing the rationale for arriving at that conclusion, the Court of Appeals noted at the outset that since the statutory title of §22 was "Modification of Awards," this supported the concept that §22 should apply only to a modification of a compensation order. (App. 31) To begin with, that was the heading for §22 when it was first enacted in 1927 when the statute dealt only with the power of the Deputy Commissioner to act during the term of an award and after a compensation order with respect to that award had become final. That section was amended

in 1934 and a provision substituted giving the Deputy Commissioner power to review a case, "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . " (App. 34)

In 1938, §22 was further amended to permit the Deputy Commissioner to make modification at any time prior to one year after he had rejected a claim. (App. 34)

33 Section U.S. Code 919(e) makes a distinction between an order rejecting a claim and the making of an award which it characterizes as a compensation order. Despite this differentiation and despite the 1938 amendment which brought rejected claims within the purview of §22, the title to that section still remained the same, i.e., "Modification of Awards." It can thus be seen that the retention of the original title to §22 cannot be considered as persuasive, particularly where later changes in the text of that section extend beyond the original designation.

The Court of Appeals did appear to concede that there was language in §22 which was directed to a situation in which no prior final order had been entered, but felt it was ambiguous. (App. 32) It noted that that section did provide that the Deputy Commissioner might review a case, "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . " (App. 32) The Court stated:

> "This passage could mean that §22 applies even if no compensation order has been entered, or that it applies regardless of whether
>
> the last payment of compensation' " (App. 32)

It also found the reference to a change in conditions as being ambiguous and therefore felt obliged to review the pertinent legislative history. (App. 32)

Petitioners contend that neither of the suggested interpretations of §22 by the Court of Appeals should make any difference in the result in this case. If §22 applies, even if no compensation order had been entered, then employee Jones' claim would be time-barred as not having been made within one year from the date of last compensation payment. If §22 applies regardless of whether a compensation order has been entered as of the date of the last payment of compensation, the claim would still be time-barred.

Petitioners contend, furthermore, that §22 of the Act is clear and not ambiguous, as the court in the *Strachan Shipping Co. v. Hollis* case held, and hence resort to the legislative history of the 1934 amendment thereto is not necessary. As was noted by Justice Felix Frankfurter, in *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States,* 340 U.S. 593, 596 (1951), statutory construction,

> "is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain, neither to add nor to subtract, neither to delete nor to distort."

Assuming that a review of §22's legislative history is in order, however, it is useful to compare the statute as it originally existed, the recommendations proposed by the United States Employees' Compensation Commission, Congress' reports and the hearings thereon, plus what was in fact finally inserted. The original unamended version of §22 provided:

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions, the Deputy Commissioner may, at any time during the term of an award and after the compensation order in respect of such award has become final, review a compensation case in accordance with the procedure prescribed in respect of claims in §919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation . . . "

Because the United States Employees Compensation Commission in its 17th Annual Report to Congress felt, as it had since its 12th Annual Report, that §22 of the Longshoremen's Act inhibited the Deputy Commissioner and gave him less authority to do justice to the parties, than similar provisions under State Compensation Acts, it recommended that §22 be amended as follows:

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions, the Deputy Commissioner may at any time review the compensation order . . . and issue a new compensation order. . . , but such new order shall not affect any compensation paid or due under authority of the prior order. The power and jurisdiction of the Deputy Commissioner over each case shall be continuing, with authority, and after a hearing if applied for, to make such modification or change by a new compensation order whenever he may determine the interests of justice require a modification of an order formerly issued." (App. 33)

The Commission's recommendations, therefore, attempted to give the Deputy Commissioner continuing power and jurisdiction, with no time limitations at all, to act with respect to compensation orders. Congress, in amending §22, although it sought to broaden the grounds on which the Deputy Commissioner could modify an award, also sought to strictly limit the period during which a modification could be made.

It should be noted that Congress did not merely rubber stamp the Commission's recommendations. First of all, it did not adopt the revisions proposed by the Commission. Secondly, as both the House of Representatives and Senate Reports reflect, the six amendments to the Act, including §22, were the result of numerous and extended conferences between representatives of maritime employers' organizations, representing the carriers, the international longshoremen's associations, representing the employees, and represented a series of compromises between the two. These amendments were submitted to the United States Employees' Compensation Commission, which pronounced them fair and equitable. H.R. Rep. No. 1244, 73rd Cong., 2nd Session, April 16, 1934, at 1, 2; Senate Report No. 588, 73rd Cong., 2nd Session, March 28, 1934, at 1. Counsel's research has failed to reveal, however, any public hearings held by either body prior to passage of the 1934 Amendment and Congressional floor discussion does not appear to elucidate the matter.

It is useful, though, to review the scenario when further amendments to §22 were proposed in 1935 before their eventual enactment in 1938. Suggested revisions were submitted by the Honorable Z. Lewis Dalby, Chief Counsel of the U.S. Employees Compensation Commission on April 30, 1937, to Subcommittee No. 4 of the

House Judiciary Committee, 75th Congress, 1st Session, on H.R. 5690. In Section 10 at Page 10 of the hearing, the report stated,

> "In the amendment of §22 of the Longshoremen's Act, as contained in the Act of May 26, 1934, no provision was made for the application of the enlarged authority therein provided to cases in which the action of the Deputy Commissioner has been a rejection of the claim. In such a case in which there has been no 'payment of compensation', the amendment fails to provide for reopening. Experience indicates that the same reasons for reopening, as provided for in this section, may exist where the claim has been rejected *as in the case where compensation has been paid either with or without an award.* The purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases finally acted upon by the Deputy Commissioner." (Emphasis added.)

At Page 20 of the Hearing, while explaining the proposed section 22 amendment, Mr. Dalby stated,

> "Section 10 of the bill relates to §22 of the Act as it was amended in 1934. In that amendment, the possibility to review an award made by a Deputy Commissioner – the possibility of the Deputy Commissioner to review his own award – was enlarged to the extent that he might reopen the case within 1 year after the last payment of compensation. But it was all

> made to depend upon the payment of compensation.
>
> "So that in a case where the claim had been rejected, and there was therefore no payment of compensation, the right to reopen was not given. And that has seemed to be probably an oversight in the drafting of that amendment and it has certainly worked injustice. We are proposing now to make that §22 extend also to that situation by adding in the provision, 'or at any time prior to one year after the rejection of a claim', and also that he may award compensation. I believe that will be clear without further statement."

Mr. Dalby was then questioned by Representative Tolan at Page 22-23 of the Hearing Record, as follows:

MR. TOLAN. May I ask you about section 10?
MR. DALBY. You mean section 10 of the act?
MR. TOLAN. Yes.
MR. HEALEY. Section 10 of the existing act?
MR. DALBY. Yes, sir. I have some copies of the act and shall be glad to give them to you gentlemen, if you wish.
MR. TOLAN. I am referring to that amendment – or at any time prior to 1 year after the rejection of the claim.
MR. DALBY. That is section 13(a).
MR. HEALEY. Where is that – in the bill?
MR. DALBY. In the bill. You are referring to the amendment in section 30. That is on

top of page 10. That is section 11 of the bill and the limitation upon the right to file a claim is section 13(a) of the act which I have just handed you. It reads this way:

> "The right to compensation for disability under this act shall be barred unless a claim therefor is filed within 1 year after the injury –"

and so on.

MR. TOLAN. That is not what I want. The language that I refer to is –

> "upon his own initiative or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the Deputy Commissioner, the Deputy Commissioner may at any time prior to 1 year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to a year after the rejection of a claim***"

MR. DALBY. That is the amendment.

MR. TOLAN. I was just trying to clear up that language, "at any time prior to 1 year." Is not that unlimited?

MR. DALBY. We have simply taken the law as it is at present. That is an amendment which was made in 1934, which you will see in this pamphlet.

MR. HEALEY. What section are you talking about?

MR. DALBY. Section 22 of the act. It is section 10 of this bill.

MR. HEALEY. I have it now.

MR. DALBY. The provision that you want to look at is –

MR. HEALEY. (reading):

> "or at any time prior to 1 year."

MR. DALBY. Yes, sir. I may say about that, that the Commission did not draft this provision 22. The Commission did not submit that amendment but accepted it and we are now trying to perfect it as it was then passed in this particular. The language which you are commenting upon is language now in the law which we are not trying to touch, because although I think it is logically subject to the criticism you make, practically it has not given any difficulty from that point of view.

It can thus be seen that Congress not only imposed a one-year requirement, contrary to the recommendations of the Commission, but it also declined to limit that section to compensation orders only, since it inserted, "whether or not a compensation order has been issued . . ."

The significance of the 1934 amendment is illustrated in the case of *American Mutual Libaility Insurance Co. of Boston v. Lowe,* 85 F.2d 625 (3d Cir. 1936). There, in considering whether the written claim of Longshoreman Zagami, which had never been the subject of a formal compensation order, was barred by §22, the Third Circuit compared §22's original language, when the claimant was hurt in 1930, to the 1934 amendment, which is applicable in this case. The Court remarked, in holding the claim to

be timely, that the 1934 amendment, which limited the Deputy Commissioner's Power to . . .

> "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . review a compensation case, 'gave no indication of retroactivity and hence should not be so interpreted.' " 85 F.2d 627.

Therefore, impliedly, if not expressly, the Court suggested that a different result would pertain if the amendment which applies here controlled. Had this not been the case, there would have been no need to discuss it. For a similar interpretation, see the district court analysis in *Strachan Shipping Co. v. Hollis,* 323 F. Supp. 1122, 1125 (S.D. Tex. 1970).

The Court of Appeals decision in this case, however, in discussing *Lowe, supra,* disagreed and said,

> "the Court did not say that the claim would be barred if no final order had been entered." (App. 36)

Yet the *Lowe* opinion, after holding that a Memorandum from a Deputy Commissioner was not a final order and that the 1934 amendment was not retroactive, stated, at page 627,

> "It follows that the claims existing at the date of the amendment were not thereby destroyed, and the time limitation therein prescribed began to run on the date of enactment, May 26, 1934. *Sohn v. Waterson, supra.*"

Thus, the decision recognized that even where there was no final order, the time-limitations provisions under §22 applied; however, since the claimant's application for further consideration of his claim was filed on September 27, 1934, it was within a year, and therefore timely.

The Court of Appeals decision here also recited that a timely filed claim remained pending until a compensation order was entered by the Deputy Commissioner, citing *Lumber Mutual Casulaty Insurance Co. of New York v. Locke,* 60 F.2d 35 (2d Cir. 1932). (App. 36) That citation is clearly inapplicable, since it was a decision rendered under the original provisions of §22, which did require the issuance of a formal compensation order. Since the 1934 amendment, the time-provisions of §22 apply whether or not a compensation order has been issued.

The Court of Appeals opinion declared its refusal to set aside the Labor Department's settled interpretation of §22, which has stood for more than 35 years (App. 35, 36) There is nothing contained in the record in this case to justify the conclusion that such an interpretation has existed except for the attachment to the concurring and dissenting opinion of Judge Ainsworth, found in *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108, 1117 (5th Cir., 1972), *cert. denied* 409 U.S. 887, *rehearing denied* 409 U.S. 1002. The attachment upon which Judge Ainsworth relied was a letter from John E. Stocker, Assistant Director of the Office of Longshoremen's and Harbor Workers' Compensation, dated August 6, 1971, affixed to the government's appellate reply brief, which was certainly nothing more than a bootstrapping *ex parte* effort by the government to bolster its position. One notes that the lower court decision being appealed from was rendered on November 6, 1970.

In addition, if the §22 interpretation was so well-settled, how does one explain the 1942 decision in *Maryland Casualty Co. v. Britton,* (Pet. for Cert., App. 25-33), the 1964 *O'Keeffe* case (Pet. for Cert., App. 19-24), the 1973 *Harris* case (Pet. for Cert., App. 34-42), and the initial result reached by Deputy Commissioner Walter in this case? In the *Harris* case, for example, no appeal was taken by the Director of the Office of Workers' Compensation Programs, and yet 33 U.S.C. §921a., and the regulations implementing same found in 20 C.F.R. §701, *et seq.* and §801 *et seq.* authorize the Secretary of Labor, the Director, Office of Workers' Compensation Programs, and the Office of the Solicitor of Labor on their behalf, to appeal decisions which affect the general administration of the Longshoremen's Act. There are numerous cases which have been decided by the Benefits Review Board, the initial reviewing body, prior to the Court of Appeals, where the Director of Workers' Compensation alone has appealed diverse general matters relating to the overall administration of the Act, such as settlement authority of Administrative Law judges, assessment of attorney's fees, etc. If Administrative Law Judge Naimark was disturbing the long-standing traditional interpretation by the Director of the Act's time-limitations provisions, an appeal would have been noted.

With respect to the compensation orders issued by Deputy Commissioner Walter, (the first rejecting the claim as being untimely, and the second awarding permanent and total disability), (App. ~~29-33~~ 16-20, ~~34-37~~ 21-24) the only reason the second order was even required was because Leavenworth Colby, (now deceased) the Justice Department attorney who answered the employee's District Court suit for the Deputy Commissioner, admitted basically every allegation of the complaint and endorsed a consent order remanding the case back to Mr. Walter for a determination on the merits.

The Deputy Commissioner's second compensation order did not reflect Mr. Walter's "long-standing interpretation" but rather Mr. Colby's view – the same view which he had unsuccessfully urged in the appellate proceedings in *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir. 1972) *cert. denied* 409 U.S. 887, *rehearing denied* 409 U.S. 1002.

The effect of the Court of Appeals opinion in this case is contrary to the announced purposes of the Act. Employers are encouraged to promptly make voluntary payments to injured employees without going through formal hearings, because in many areas, the statute is virtually self-executing. *Atlantic and Gulf Stevedores v. Donovan,* 274 F.2d 794 (5th Cir. 1960).

That the voluntary approach under the Longshoremen's and District of Columbia Acts is both encouraged and utilized with no formal hearing, is graphically demonstrated by the following combined statistics from both Acts, gleaned from annual reports and annual statistical reports of the Department of Labor, which counsel has been able to obtain:

Year	"Final Disposition of Injury Cases: Number of Cases Closed:	"Formal Hearings Completed"
1963	107,261	410
1964	112,956	421
1965	122,439	408
1966	122,239	343
1967	114,587*	331
1968	114,587*	281
1969	114,939	314
1970	109,945	261
TOTAL	918,953	2,769

*Average figures

These figures demonstrate that over 99% of the time claims were adjusted without the necessity of formal hearing, and although in theory formal orders may issue without a formal hearing, the instances where this is done would be negligible. The point is that if the Court of Appeals' decision here is adopted throughout the country, then for the 8-year period referenced above, there are potentially hundreds of thousands of claims where the limitations period has not even begun to run despite their being listed by the Labor Department as being finally disposed of and closed.

The beneficient purposes of the statute are undisputed. As this Court, however, stated in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 201 (1952).

> ". . . We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statutue of limitations at will and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us."

A similar theme was sounded in *Strachan, supra:*

> "It may well be that our decision that the payment of September 3, 1957, was the last payment" within the meaning of Section 22 of the Act (thereby triggering the one year limitations period with respect to modifications of compensation awards) will make it difficult for injured employees to obtain adequate compensation commensurate with the full extent of their physical disabilities. Should that eventuality occur, it would be for Congress either to lengthen Section 22's limitations period or to provide other means to postpone the running of the statute of limitations." 460 F.2d 1108, 1116 (5th Cir. 1972).

It is therefore significant that Congress recently embarked on a comprehensive overhaul of the Longshoremen's Act and yet left Section 22 intact. The various amendments to the Act were enacted on October 27, 1972, and became effective on November 26, 1972. The lower court opinion in *Strachan* was rendered on November 6, 1970, and the Court of Appeals' affirmance was dated May 17, 1972. Since both the Assistant Director of the Office of Longshoremen's and Harbor Workers' Compensation, United States Department of Labor, and Mr. Colby, the Special Assistant to the Attorney General, were aware of that case, having been involved in same, and the Labor Department acted in an advisory capacity and participated in the drafting of this recent legislation, it can be assumed that either Congress was not dissatisfied with the court rulings interpreting Section 22 or in general it just declined to respond to invitations for change by the courts.

Further evidence of Congress's disinclination to tamper with the limitations' provisions of the Act is the fact that on June 6, 1941, Representative Welch introduced H.R. 4986, which would have changed both §13(a) and §22. House of Representatives Bills, 77th Congress, 1941-1942, Vol. 22. Although the bill was referred to the House of

Representatives Committee on the Judiciary, it was never enacted.

Finally, consider the language of the Regulations passed in 1938 to insure the proper administration of the Act. The following regulation remained unchanged until the 1972 amendments referred to above. In 20 C.F.R. §31.5, *Claims for Compensation,* one finds,

> A claim for compensation may be filed with the deputy commissioner for the compensation district in which the injury occurred at any time after the first 7 days of disability following any injury, or at any time after death. The right to compensation for disability shall be barred unless a claim therefor is filed within 1 year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within 1 year after the death, except that if payment of compensation has been made without an award on account of such injury or death, a claim may be filed within 1 year after the date of the last payment *and except that where the said act provides for the running of the said year limitation from any other date, the provisions of said act shall apply.* For the purpose of filing such claims the Bureau has provided separate forms for use in injury and death cases which shall be furnished to any person desiring to file such a claim, upon application therefor made to such deputy commissioner. (Sec. 19(a), 44 Stat. 1435; 88 U.S.C. 919(a)" (Emphasis added.)

It is respectfully urged that both the statute and the regulations implementing same clearly bar the claim of Charles Jones.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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